

**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE**

Atlantic Administrators
Insurance Agency, Inc. &
Brokerage Concepts, Inc.

v.

Civil No. 06-cv-230-JM

Melcher & Prescott Agency, Inc.

O R D E R

Plaintiff Atlantic Administrators Insurance Agency, Inc., ("Atlantic") is a wholly owned subsidiary of plaintiff Brokerage Concepts, Inc. ("BCI") and administers self-funded health care benefit plans. Defendant Melcher & Prescott Agency, Inc. ("MPA") is a brokerage firm that arranged for Atlantic to administer the self-funded plans of two parties not involved in this action, the City of Laconia and the Laconia School District (jointly referred to hereinafter as "Laconia"). One of MPA's brokers, Alexander Ruch ("Ruch"), acted as Laconia's agent to obtain contracts for Atlantic to provide certain administrative services for Laconia's health care benefit plans from July 1, 2002 until June 30, 2004. During the course of negotiating and obtaining those contracts,

Ruch made several misrepresentations related to the costs associated with funding the plans, which allegedly caused Laconia to underfund them and lose nearly \$3 million. In a separate action pending before this court, see City of Laconia and Laconia Sch. Dist. v. Atlantic Adm'rs Ins. Agency & Brokerage Concepts, Inc., Civil No. 05-306-JD (the "Laconia litigation"), Laconia sued Atlantic and BCI to recover the money lost due to their alleged failure to discover and/or inform Laconia of Ruch's misrepresentations. Plaintiffs brought this action against MPA to recover losses sustained because of the terminated contracts and the Laconia litigation. Currently before the court are defendant MPA's motion to dismiss the complaint (document no. 13) and plaintiffs' motion to amend the complaint (document no. 17). Each motion is disposed of as set forth below.

1. Motion to Amend (document no. 17)

Plaintiffs move to amend the complaint pursuant to Fed. R. Civ. P. 15(a). Defendant objects and raises two arguments in support thereof. First, defendant argues the fully briefed motion to dismiss should be decided before the amendment, which bolsters the allegations pertaining to the alleged express indemnification agreement, can properly be considered. Second,

defendant asserts that plaintiffs seek to advance a different theory in support of their claim for tortious interference with contractual relations. Defendant contends the originally pled claim for tortious interference with contractual relations fails to state a claim and that the amended claim fails to cure the defect in the original complaint, rendering the amendment futile.

A complaint may be amended after an answer has been filed by leave of court, which "leave shall be freely given when justice so requires." See Fed. R. Civ. P. 15(a). Among the factors to consider when deciding whether to grant the motion are "'undue delay" in filing the motion and "undue prejudice to the opposing party" by virtue of allowance of the motion.'" Invest Almaz v. Temple-Inland Forest Prods. Corp., 243 F.3d 57, 71 (1st Cir. 2001) (quoting Acosta-Mestre v. Hilton Int'l, 156 F.3d 49, 51 (1st Cir. 1998) (quoting Foman v. Davis, 371 U.S. 178, 182 (1962))). "[B]ad faith or dilatory motive on the part of the movant, . . . [or] futility of amendment'" are also relevant to the analysis. Newcare Health Corp. v. Midway Healthcare Ctr. (In re Newcare Health Corp.), 274 B.R. 307, 311 (Bankr. D. Mass. 2002) (quoting Foman, 371 U.S. at 182).

Defendant fails to support its opposition to the amendment

with any showing of plaintiffs' undue delay, bad faith or dilatory motive that would somehow prejudice defendant if the amendment were allowed. This is plaintiffs' first attempt to amend their pleading, filed approximately eight months after the original complaint was filed and two months after defendant's motion to dismiss was filed. Responding to problems in a pleading that are identified in a motion to dismiss is an appropriate reason to amend a complaint. See e.g. DM Research, Inc. v. Coll. of Am. Pathologists, 170 F.3d 53, 56 (1st Cir. 1999) (explaining plaintiff could have responded to the arguments for dismissal with an amendment to the complaint to provide "the district court with additional facts to make its complaint concrete and plausible"); see also In re Biopure Corp. Derivative Litig., 424 F. Supp. 2d 305, 307 (D. Mass. 2006) (granting leave to amend to bolster allegations in complaint with additional facts); cf. In re Stone & Webster, Inc. Sec. Litig., 217 F.R.D. 96, 98-99 (D. Mass. 2003) (denying motion to amend where plaintiffs failed to cure defects until after motion to dismiss decided). The proposed amendment raises no new claims or parties. No substantive rulings on any of the claims have yet been issued. Discovery is ongoing. At this initial stage of

litigation, with no indication of any prejudice to defendant, leave to amend the complaint is readily justifiable.

I also am unpersuaded by defendant's futility argument. Comparing the original and proposed amended complaints, the only difference between the tortious interference with contractual relations claim is the addition of the clause "thereby causing the City and the District to terminate their contracts with Atlantic Administrators." See Complaint, ¶ 47 and Amended Complaint, ¶ 48. To state a claim for tortious interference with contractual relations, plaintiffs must allege: "(1) the plaintiff had an economic relationship with a third party; (2) the defendant knew of this relationship; (3) the defendant *intentionally* and *improperly* interfered with this relationship; and (4) the plaintiff was damaged by such interference." Hughes v. N.H. Div. of Aero., 152 N.H. 30, 40-41, 871 A.2d 18 (2005) (emphasis in original). By alleging that MPA knew of Atlantic's contracts with Laconia and improperly interfered with them when Ruch misrepresented critical financial details to Laconia, which caused Laconia to terminate its relationship with Atlantic and which, in turn, caused plaintiffs to lose profits, plaintiffs have asserted sufficient facts to state a claim for tortious

interference with contractual relations.

The insertion of the clause pertaining to Laconia's decision to terminate the contracts with Atlantic does not alter the analysis of whether or not plaintiffs have stated a viable claim for relief. Defendant argues the contract term expired on June 30, 2004, so Laconia's decision not to continue to do business with Atlantic for a new term beginning July 1, 2004 fails to state a claim for tortious interference with contractual relations, because the contract was ending by its own terms. All of the factors that influenced Laconia's decision not to continue to do business with Atlantic are not entirely clear in either the original or the amended complaint, but they do not have to be. The allegation that Ruch's conduct caused Laconia to stop doing business with Atlantic sufficiently puts defendant on notice of the charges lodged against it to clear the low threshold of a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Defendant has failed to demonstrate that the proffered amendment would be futile. Cf. Correa-Martinez v. Arrillaga-Belendez, 903 F.2d 49, 59 (1st Cir. 1990) (denying motion to amend where the proffered facts would not cure the claims' defects); see also Norton v.

Caton, No. 04-cv-439-JD, 2005 WL 1009544, at *4 (D.N.H. May 2, 2005) (same).

Plaintiffs' motion for leave to amend (document no. 17), therefore, is granted. The clerk's office is ordered to docket the Amended Complaint, which shall be the controlling pleading in this action.

2. Motion to Dismiss (document no. 13)

Because plaintiffs' motion to amend is granted, defendant's pending motion to dismiss the original complaint (document no. 13) is denied as moot, without prejudice. See e.g. Caton v. Norton, 2005 WL 1009544 at *3 (allowing motion to amend can moot pending motion to dismiss); Portfolioscope, Inc. v. I-Flex Solutions Ltd., 473 F. Supp. 2d 252, 254 (D. Mass. 2007) (same).

SO ORDERED.

/s/ James R. Muirhead
James R. Muirhead
United States Magistrate Judge

Date: June 29, 2007

cc: William D. Pandolph
Mark L. Mallory